Kejuruteraan Samudra Timur Sdn Bhd v Seli a/k Mandoh & Anor

HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTION NO R2–25–10 OF 1999

RAUS J

10 OCTOBER 2003

Administrative Law — Judicial review — Remedies — Application for certiorari — Industrial Court — Whether Industrial Court erred in its decision — Whether decision to be quashed

Civil Procedure — Certiorari — Application for an order of certiorari to quash award of Industrial Court — Court's jurisdiction to issue orders of certiorari — Courts of Judicature Act 1964 s 25

Labour Law — Employment — Reduction in salaries — Whether unilaterally exercised — Whether a repudiation of service contract — Constructive dismissal — Whether established

The first respondent was the technical manager of the applicant, earning a monthly salary of RM4,200. On 21 August 1998, the manager of the applicant called for a meeting attended by the first respondent, its consultant, the mechanist and the sales manager, where they were informed of a reduction in pay by 30%. The first respondent considered such unilateral decision to reduce his salary amounted to a repudiation of his contract of employment. The first respondent's representation was referred to the Industrial Court ('the IC') and the IC found that such a reduction in pay amounted to a variation of the terms of the first respondent's employment, which was a fundamental breach and amounted to a repudiation. Therefore, the first respondent was held to be constructively dismissed and ordered the applicant to pay backwages and compensation in the total sum of RM86,950. The applicant being unsatisfied with the award filed for an order of certiorari in the High Court to quash the IC's award.

Held, dismissing the application with costs:

(1) The High Court only has extraordinary original jurisdiction, i.e, it cannot arrogate the powers of the Court of Appeal by substituting its own judgment for that of the IC on questions of fact and cannot review theevidence. Therefore, it is vital to note that when dealing with an application for certiorari, the High Court does not act as an appeal court (see paras 8–9).

(2) In the instant case, the applicant made the certiorari application concluding that the IC committed errors of law and as such acted without and/or in excess of jurisdiction on five grounds. The learned judge detailed each ground and dismissed them because the IC's award did not suffer from any of the infirmities of 'illegality', 'irrationality', or 'procedural impropriety' which warranted a judicial review. The award was neither perverse nor unreasonable and the findings of fact by the learned chairman were supported by evidence (see paras 10 and 23).

[**Bahasa Malaysia summary**

Responden pertama adalah pengurus teknikal pemohon, dengan gaji bulanan sebanyak RM4,200. Pada 21 Ogos 1998, pengurus pemohon telah memanggil satu mesyuarat yang dihadiri oleh responden pertama, perunding-perundingnya, ahli mekanik dan pengurus jualan, di mana mereka dimaklumkan tentang pengurangan bayaran sebanyak 30%. Responden pertama menganggap keputusan satu pihak tersebut yang mengurangkan gaji beliau membentuk pembatalan kontrak pekerjaannya. Representasi responden pertama telah dirujuk kepada Mahkamah Perusahaan ('MP') dan MP mendapati pengurangan dalam bayaran membentuk pengubahan terma-terma pekerjaan responden pertama, yang merupakan satu perlanggaran utama dan membentuk satu pembatalan. Oleh itu, responden pertama telah dipecat secara konstruktif, satu pemecatan tanpa sebab atau alasan adil dan pemohon diperintahkan membayar tunggakan gaji dan pampasan berjumlah RM86,950. Pemohon tidak berpuas hati dengan award tersebut telah memfailkan satu perintah certiorari di Mahkamah Tinggi untuk membatalkan award MP tersebut.

Diputuskan, menolak permohonan dengan kos:

(1) Mahkamah Tinggi hanya mempunyai bidang kuasa asal yang luar biasa, iaitu, ia tidak boleh mengambil kuasa Mahkamah Rayuan dengan menggantikan penghakimannya sendiri dengan MP atas persoalan-persoalan fakta dan tidak boleh mangkaji semula keterangan. Oleh itu, adalah penting semasa mengendalikan permohonan certiorari, Mahkamah Tinggi tidak bertindak seperti Mahkamah Rayuan (lihat perenggan-perenggan 8–9).

(2) Dalam kes semasa, pemohon telah membuat permohonan certiorari mengatakan bahawa MP telah melakukan kesilapan undang-undang dan oleh demikian bertindak tanpa dan/atau melampaui bidang kuasa berdasarkan lima alasan. Hakim yang arif telah meneliti setiap alasan dan menolak kesemuanya kerana award MP tidak mengalami apa-apa kelemahan 'illegality', 'irrationality', atau 'procedural impropriety' yang mewarankan kajian semula. Award tersebut tidak berlawanan atau munasabah dan fakta-fakta penemuan oleh pengerusi yang bijaksana disokong oleh keterangan (lihat perenggan-perenggan 10 dan 23).]

Notes

For cases on applications for an order of certiorari to quash the award of the Industrial Court, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) para 1382.

For cases on remedies for judicial review, see 1 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 177–178

Cases referred to

Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374 (refd)

Malayan Banking Bhd v Association of Bank Officers, Peninsular Malaysia & Anor [1988] 3 MLJ 204 (refd)

Non-Metallic Mineral Products Manufacturing Employees Union v South East Asia Fire Bricks Sdn Bhd [1976] 2 MLJ 67 (refd)

R Ramachandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145 (refd)

William Jacks & Co (M) Sdn Bhd v S Balasingam [2000] 7 MLJ 1 (refd)

Dr Rayanold Pereira v Minister of Labour Malaysia & Anor [1997] 5 MLJ 336 (refd)

Legislation referred to

Courts of Judicature Act 1964 s 25
Industrial Relations Act 1967 s 20(1), (3)

Kumar (Suria Kumar & Co) for the applicant.
P Kuppusamy (P Kuppusamy & Co) for the first respondent.

Raus J:

[1] This is an application by the applicant for an order of certiorari to quash the decision of the Industrial Court, in Award No 677 of 1998 made on 29 December 1998. The Industrial Court found that the first respondent had been constructively dismissed and the dismissal was without just cause or excuse and ordered the applicant to pay backwages and compensation in the total sum of RM86,950.

[2] The relevant facts giving rise to this application are as follows.

[3] The first respondent commenced employment with the applicant on the 1 August 1993 at its Wellhead/Xmas Tree/Valve Maintenance as a Workshop Supervisor with a basic salary of RM4,000 per month. Upon expiry of his contract, he was offered a permanent employment as a Technical Manager in the Repair and Maintenance Division, effectively on 1 August 1996 with a basic salary of RM4,200 per month. He had also received RM500 housing allowance.

[4] The problem between the first respondent and the applicant started on 21 August 1997, when the Director cum Manager of the applicant, MrWee Khea Peng ('COW1'), held a meeting attended by the first respondent, Mr Kevin Franks ('the Consultant'), Mr. Patrick Green ('the Mechanist') and En Mohsin Abdullah (the Sales Manager) where they had been informed that their salaries would be reduced by 30%. The reason given was that the applicant incurred losses in excess of RM500,000. The reduction in salary by 30% was confirmed by the applicant in a letter dated 25 August 1997, addressed to the first respondent.

[5] The first respondent considered the applicant's decision of reducing his salary by 30% amounted to a repudiation of his contract of employment. On 2 September 1997 the first respondent wrote to the applicant intimating to the applicant that he treated himself as being dismissed by the applicant. The first respondent then made representations to the Director General of Industrial Relation under s 20(1) of the Industrial Relation Act 1967 ('the Act'). As there was no settlement being reached between the parties, the Honourable Minister for Human Resources ('the Minister') referred the first respondent's representations to the Industrial Court under s 20(3) of the Act.

[6] The Industrial Court found that the reduction of the first respondent's salary was a variation of the terms of the first respondent employment. According to the learned Chairman, the variation is a fundamental breach and amounting to a repudiation since it goes to the root of the contract. Thus, she concluded that the first respondent was constructively dismissed, a dismissal without just cause or excuse.

[7] Thus, the applicant's application is for judicial review. The correct statement of the current law relating to judicial review may be found in the

decision of the Federal Court in the case of *R Ramachandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145. In that case, Edgar Joseph Jr FCJ, relying on the decision of Lord Diplock in the case of *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, adopted three grounds under which a decision is amendable to judicial review namely:

(a) illegality — that the decision-maker had failed to keep strictly within the perimeter of its powers;

(b) irrationality — that the decision was so outrageous in its defiance of logic or accepted moral standard that no sensible person who had applied his mind to the question to be decided could have arrived at it; and

(c) procedural impropriety — that the decision-maker had failed to observe basic rules of natural justice and or procedural rules.

[8] It can be seen that the circumstances under which the High Court can interfere with the decision of the Industrial Court are limited. It must be for good reasons. The reasons given by Raja Azlan Shah FCJ (now His Majesty the Sultan of Perak) in the Federal Court case of *Non-Metallic Mineral Products Manufacturing Employees Union v South East Asia Fire Bricks Sdn Bhd* [1976] 2 MLJ 67 are as follows (at p 68):

> Proceedings by way of certiorari with regard to industrial disputes are not as of right otherwise they may materially affect the fundamental basis of the decision of the Industrial Court under the Industrial Relations Act 1967, namely, quicker solution to industrial dispute to achieve industrial peace. The Act is intended to be a self-contained one. It seeks to achieve social justice on the basis of collective bargaining, conciliation and arbitration. Awards are given, in circumstances peculiar to each dispute and the Industrial Court is to a large extent free from the restrictions and technical considerations imposed on ordinary courts. The jurisdiction of the High Court to issue orders of certiorari is neither an appellate nor revisional jurisdiction. Also from the very nature of the power conferred under s 25 of the Courts of Judicature Act 1964, it is clear that in exercise of this power the High Court exercised original jurisdiction. This jurisdiction stems from the prerogative jurisdiction inherited from the United Kingdom courts and its object is mainly to enable the superior courts to keep inferior tribunals within the bounds of their authority. The supervisionary character is essential for always in the background there is the beguiling illusion that an inferior tribunal entrusted to hand down awards of a final nature may hand down awards as it likes. Therefore, the jurisdiction may for convenience be described as an extraordinary original jurisdiction. The circumstances under which the High Court can interfere with the decision of the Industrial Court are limited. For instance, it has no jurisdiction under s 25 of the Courts of Judicature Act to interfere with the findings of facts by the Industrial Court on the ground that the decision is erroneous except where there is a clear error of law on the face of the record. It cannot arrogate the powers of a Court of Appeal by substituting its own judgement for that of the Industrial Court on questions of fact and cannot review the evidence.

[9] It must also be noted that one of the foremost principles relating to the High Court's role in dealing with an application for certiorari is that the court does not act as an appeal court. The Court of Appeal in *William Jacks & Co (M) Sdn Bhd v S Balasingam* [2000] 7 MLJ 1 held that a court cannot utilize certiorari proceedings as a clock to entertain an appeal against findings of facts. The Supreme Court in *Malayan Banking Bhd v Association*

of Bank Officers, Peninsular Malaysia & Anor [1988] 3 MLJ 204 held that the tasks of fact finding falls within the jurisdiction of the Industrial Court.

[10] With the above principles in mind, I shall now consider the grounds advanced by the applicant. The applicant in its application content that the Industrial Court had committed errors of law and as such, acted without and/or in excess of jurisdiction on the grounds which can be summarized as follows:

(i) the Industrial Court limited its consideration to the evidence adduced by the first respondent against the applicant only, that is the reason why he considered himself as constructively dismissed by the applicant and as such, the Industrial Court failed to scrutinize the behaviors of both parties on the whole and weigh the cumulative effect;

(ii) the Industrial Court failed to give consideration on all the evidence by the applicant and the decision was contradicting to the evidence adduced by the applicant;

(iii) the Industrial Court gave consideration to irrelevant issues and wrong questions, that is, there was no provision in the notice of appointment of the first respondent which allowed the deduction of his salary when the applicant incurs losses because a provision as such cannot exist in a contract of employment and it is perverse;

(iv) the Industrial Court failed to give due consideration to the fact that the reduction of the first respondent's salary was not done unilaterally; and

(v) reduction of the first respondent's salary was the discretion of the applicant.

(i) The Industrial Court limited its consideration to the evidence adduced by the first respondent only

[11] I am unable to agree to the applicant's first ground of challenge. To me, the Industrial Court in arriving at its decision that the first respondent was constructively dismissed and dismissed without just cause or excuse did not limit its consideration to the evidence adduced by the first respondent only. As can be seen from the Award, the learned Chairman after considering the issues to be considered in accordance with the law on constructive dismissal, had scrutinized the evidence of both parties, applied the law to the facts and finally made a reasoned conclusion. The learned Chairman's critical analysis of the evidence of both parties can be found at pp 5 and 9 of the award. Firstly, she scrutinized the evidence of the first respondent concerning the reduction of salary. Then she scrutinized the applicant's evidence on the reduction of salary. The learned Chairman even went to consider the applicant's evidence on its justification for the salary reduction and its contention that the first respondent was agreeable to the salary reduction. From the critical analysis of the evidence of both parties, the learned Chairman made the following findings of fact as follows:

It is abundantly clear to the court that the Claimant never agreed to the deduction of his salary and had protested right from the beginning that is at the meeting on 21 August 1997. This can be discerned from the evidence. Although the company tries to argue otherwise, the three other employees who were present at the meeting on 4 August 1997 were not called to corroborate COW1's evidence that the Claimant had indeed agreed to the reduction in pay.

[12] On the applicant's justification for the salary reduction, the learned Chairman made the following findings:

It is the evidence of the Company's witness that the Company did not consider a lower rate of reduction by ordering a reduction across the board to all its employees. The fact that it had not considered this, shows that the intention was no bona fide. Only four employees were affected and they have since left the company. COW1 was not affected by the pay cut although he was in charge of the division. The Court finds that the reason put forth that is he is paid a director's fees as unacceptable.

[13] As the first respondent's pleaded case was that the unilateral salary reduction amounted to a repudiation of his contract of employment thereby entitling him to treat himself as constructively dismissed, the learned Chairman reviewed the law on the issue of salary reduction by saying as follows:

In this case the company called a public accountant (COW2) who testified as to the summary accounts which showed the company's losses. Be that as it was, it is significant to note that there is no provision in the Claimant's letter of appointment which allows the deduction of his salary when the company incurs loss in its business. In *Dr Rayanold Pereira v Minister of Labour Malaysia & Anor* [1997] 5 MLJ 336, the High Court observed as follows (at p 370):

'… The allegation of breach of contract employment through the salary cut and non-payment of March 1993 salary are not without basis. There is no provision for loan in the contract enabling the salary cut.'

[14] It is the submission of learned counsel for the applicant that the learned Chairman erred in relying to the case of *Dr Rayanold Pereira v Minister of Labour Malaysia & Anor* [1997] 5 MLJ 336. His contention is that the said case could not be relied upon as the decision was based on the contract of employment where there is 'no provision for loan in the contract enabling the salary cut'. Whereas in this present case, according to the learned counsel, the first respondent has agreed to the deduction of his salary and has knowledge of the losses incurred at the 'Repair and Maintenance Division'. With respect, the contention is without merit. The learned Chairman as stated earlier, clearly made a finding of fact that there is no truth that the first respondent had agreed to the reduction of salary.

[15] Thus, to me, the learned Chairman, in arriving to the conclusion that the first respondent was constructively dismissed, and the dismissal was without just cause or excuse did not limit its consideration only to the evidence adduced by the first respondent. She had considered the evidence as a whole, scrutinized the evidence, applied the law to the facts and made a reasonable conclusion.

(ii) Failed to give consideration all the evidence by the applicant and the decision contradict to the evidence adduced by the applicant

[16] It is submitted by the learned counsel for the applicant, that the Industrial Court committed an error of law and as such, acted without and/or outside its jurisdiction because it failed to give consideration to the following evidence adduced by the applicant:

(a) the first respondent had been given explanation about the losses incurred in the Repair and Maintenance Division in a meeting on 21 August 1997 by the Operation Manager and a copy of the profit and loss accounts had been given to the first respondent and he had no objection to the said pay-cut exercise by the applicant;

(b) the first respondent as a director and shareholder of the applicant has knowledge of the losses incurred in the Repair and Maintenance Division which was increasing and the Executive Director had given a briefing to the first respondent regarding the loss;

(c) the first respondent vide letter dated 6 October 1997 to the applicant agreed to and supported the applicant's move to reduce his salary by 30%.

[17] With respect, I am unable to agree. The learned Chairman had, in her award, considered all the evidence as stated above. The learned Chairman dealt with the evidence COW1 and COW3 in the following manner:

> COW1, the Company's main witness, testified that on 21 August 1997 he had a meeting with the Claimant and the other three non-Malaysian employees when he informed them of the losses incurred by the Division. He maintained that they know the Company was incurring losses and all accepted the proposed reduction in salary. COW1 then explained that he was not affected by the reduction because as a director he drew a fee and not a salary.
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> The Executive Director of the Company, Dato' Chee Peah Kiat (COW3) gave evidence that he had explained COW1's position to the Claimant. He said that COW1 was not a salaried employee but as a Director of the Company and took adirector's fee instead. COW3 attested that the reason for the salary cut was to give the Company a breathing space due to the losses incurred.

[18] From the evidence above, the learned Chairman concluded that the first respondent never agreed to the deduction of his salary and had protested right from the beginning, that is, at the meeting held on 4 August 1997. The learned Chairman had also found as a fact that the salary deduction was not bona fide. This is because four employees were affected and they have since left the applicant. COW1 was not affected by the pay cut, although he was in charge of the Division. The learned Chairman found that the reason put forth that is COW1 was paid a director's fees, as unacceptable.

[19] Based on the above, I am of the view that the Industrial Court findings were neither perverse nor unreasonable. The findings were supported by evidence, contrary to what was alleged by the applicant.

(iii) Gave consideration to irrelevant issue and a wrong question, that is, there was no provision in the notice of employment of the first respondent which allowed the deduction of his salary

[20] With respect, I am again unable to agree. To me, the learned Chairman had addressed the correct question of law when she considered that there was no provision in the claimant's contract of employment which allowed the reduction of his salary when the applicant incurs losses in his business. This issue is relevant and centred to the first respondent's case of constructive dismissal. The first respondent pleaded that the unilateral reduction of his salary amounted to a repudiation of his contract of employment. Thus, the question for the Industrial Court to determine was whether the contract itself provided for such a reduction. The Industrial Court made a finding of fact that there was no such provision in the contract and the first respondent did not consent to the massive reduction of 30% of his salary. To me, the learned Chairman was right to conclude the unilateral reduction of an employees pay constitute a fundamental and repudiatory breach of the contract of employment.

(iv) Failed to give due consideration to the fact that the reduction of the first respondent was not done unilaterally

[21] As stated earlier, the circumstances under which the High court can interfere with the decision of the Industrial Court are limited. It has no jurisdiction to interfere with the findings of fact by the Industrial Court. Italso cannot substitute its own judgment for that of the Industrial Court on question of fact and cannot review the evidence. In this case, the Industrial Court had made a findings of fact that the reduction of the first respondent was done unilaterally. She had analysed the evidence and there was no clear error on the face of the record for this court to interfere.

(v) Reduction of the first respondent salary was discretion of the applicant

[22] It is submitted for the applicant that the Industrial Court had failed to take into account of the applicant's bona fide act in exercising its discretion to reorganize its business. This, according to the applicant was within the managerial discretion. With respect, I am unable to agree. The issue here is not concerning the discretion of the applicant to organize and arrange its business in the manner it consider best. But the real issue is whether the reduction of the first respondent salary was bona fide. The Industrial Court found it as a matter of fact that the reduction was not bona fide and this court has no reason to interfere.

[23] In conclusion, I am of the view that the Industrial Court Award does not suffer from any of the infirmities of 'illegality', 'irrationality', or 'procedural impropriety'. The award was neither perverse nor unreasonable and the findings of fact by the learned Chairman were supported by evidence. This court has no reason to interfere with the Award by way of judicial review. In the circumstances, the applicant's application is hereby dismissed with costs.

Application dismissed with costs.

Reported by Rinchen Tee